

2015

State of Utah v. Richard Andrew Jones : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

Plaintiff/Appellee,

v.

RICHARD ANDREW JONES,

Defendant/Appellant.

BRIEF OF APPELLANT

Court of Appeals No. 20141161 CA

APPEAL FROM A JUDGMENT ENTERED
IN THE FIFTH JUDICIAL DISTRICT COURT OF UTAH,
WASHINGTON COUNTY, HONORABLE ERIC A. LUDLOW

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FILED
UTAH APPELLATE COURTS

DEC 11 2015

STATE OF UTAH

V.

Defendant/Appellant.

Court of Appeals No. 20141161 CA

Attorneys for Defendant/Appellant

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This issue was not raised in the trial court and is raised for the first time with this appeal.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

U.S. Const. amend. VI: Rights of accused persons.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Utah Const. art. I, § 12: Rights of accused persons.

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel...

77-13-6. Withdrawal of plea.

- (1) A plea of not guilty may be withdrawn at any time prior to conviction.
- (2)
 - (a) A plea of guilty or not contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.
 - (b) A request to withdraw a plea of guilty or not contest, except for a plea held in abeyance, shall be made by motion before sentence is announced.

Sentence may not be announced unless the motion is denied. For a plea

warrant on the same day. R. at 6. On April 12, 2011 defendant was arrested and attended the Initial Appearance via video from the Washington County Jail. R. at 18, 20.

On April 15, 2013, a letter from the defendant was filed requesting new counsel on the grounds that the defendant was unable to make adequate contact with his current counsel. R at 143. A hearing regarding appointment of new counsel was held on April 25, 2013. R. at 146-147. The court denied the defendant's request for new counsel. R. at 433, p. 11, lines 3-9.

The court ordered several competency evaluations, and, at the competency hearing held on December 14, 2013, stated that the court would receive by stipulation four competency reports. R. at 178, p. 3, lines 12-22; p. 4, lines 1-8. On March 26, 2014, Findings and Conclusions Re: Defendant's Competency to Proceed to Trial was filed, and, on the same day, the court signed the Order finding the defendant competent to proceed to trial. R. at 211-221.

On March 26, 2014, an Amended Information was filed, again charging the defendant with two counts of Aggravated Murder, first degree felonies. R. at 223-224. On that same day a preliminary hearing was held during which the court found the State had met its burden of proof, and the defendant was bound over for trial. R. at 228. On September 9, 2014, at a change of plea hearing, the court accepted the defendant's pleas of no contest to both counts. R. at 321. At the sentencing hearing held on November 25, 2014, the defendant was sentenced to life in prison without the possibility of parole for

III. Disposition at the Trial Court.

Based on the defendant's pleas of no contest, the trial court sentenced the defendant to serve, for each count, life in prison without the possibility of parole, with the sentences to be served consecutively, and ordered the defendant to pay restitution in the amount of \$5,711.91. R. at 397-399.

IV. Statement of Relevant Facts.

On April 15, 2013, during the pendency of the case at the trial court, a letter from the defendant was filed requesting new counsel on the grounds that the defendant was unable to make adequate contact with his current counsel. R at 143. The defendant addressed the court regarding this letter at a review hearing held on April 25, 2013, and asserted that his appointed counsel would not take his phone calls and had blocked calls to defense counsel's cell phone. R. at 433, p. 4, lines 5-25; p. 5, lines 1-6.; p. 6, lines 2-10, 23 -25; p. 7, lines 1-10. Defense counsel was allowed to comment on the defendant's assertion and explained that he had not blocked any calls nor refused to take defendant's calls. R. at 433, p.7, lines 16-25, p. 8, lines 1-24. The court denied the defendant's request for new counsel. R. at 433, p. 11, lines 3-9.

On September 9, 2014, defendant entered pleas of no contest to counts 1 and 2. R. at 434, p. 5. line 25, p. 6, lines 1-7. During the Change of Plea hearing, the court asked defendant if he understood that a plea of no contest would be treated the same as a guilty

been unable to find any meritorious, non-frivolous arguments in favor of defendant, and therefore requests permission to withdraw as counsel pursuant to the Court's ruling in *State v. Clayton*, 630 P.2d 168, (Utah 1981).

Notwithstanding the above, and in accordance with *State v. Clayton*, (following *Anders v. California*, 386 U.S. 738 (1967)), defendant's appellate counsel will highlight all the arguments that the defendant has communicated, which defendant believes will support his appeal. Pursuant to the Court's ruling in *State v. Wells*, 2000 UT App 304; 13 P.3d 1056, defendant's appellate counsel certifies that counsel has provided this brief to the defendant and requested defendant to raise any additional issues so that they may be incorporated herein.

I. The defendant was not afforded effective assistance of counsel.

Defendant asserts that he was denied effective assistance of counsel based upon his inability to communicate regularly with his counsel during the pendency of his case and because his counsel did not adequately explain the impact of defendant pleading no contest to the charges against him. The defendant points to his April 15, 2013, letter to the trial court requesting new counsel (R. at 143) as a basis for his claim that trial counsel was ineffective. Defendant also asserts that his trial counsel did not adequately explain the limitations that pleading no contest would have on his rights to appeal and the issues subject to an appeal.

(citations and internal quotation marks omitted). "When a defendant pleads guilty, he 'waives all nonjurisdictional defects, including alleged pre-plea constitutional violations.'" *State v. Smith*, 2013 UT App 52, ¶ 6, 306 P.3d 810 (quoting *State v. Rhinehart*, 2007 UT 61, ¶ 15, 167 P.3d 1046). "Thus, 'failure to withdraw a guilty plea within the time frame dictated by [Utah Code] section 77-13-6 deprives [both] the trial court and appellate courts of jurisdiction to review the validity of the plea.'" *Id.* (alterations in original) (quoting *State v. Ott*, 2010 UT 1, ¶ 18, 247 P.3d 344).

Here, Stone never filed a motion to withdraw his guilty pleas. Accordingly, this court lacks jurisdiction to review Stone's claims that his trial counsel provided ineffective assistance and that the district court erroneously accepted his guilty pleas. *See Rhinehart*, 2007 UT 61, ¶¶ 14, 22, 167 P.3d 1046 (holding that an ineffective assistance of counsel claim cannot successfully evade the well-established jurisdictional bar of section 77-13-6); *see also Ott*, 2010 UT 1, ¶ 18, 247 P.3d 344; *State v. Mullins*, 2005 UT 43, ¶ 11 n.2, 116 P.3d 374; *State v. Merrill*, 2005 UT 34, ¶ 19, 114 P.3d 585; *State v. Lee*, 2011 UT App 356, ¶ 2, 264 P.3d 239 (mem.).

Id. at ¶¶ 5-6; 305 P.3d 168-169. Thus, this Court lacks jurisdiction to hear this appeal.

B. Nothing in the record supports defendant's claim of ineffective assistance of counsel.

"An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Clark*, 2004 UT 25, ¶6; 89 P.3d 162. To prove ineffective assistance of counsel, a defendant must show "(1) that counsel's performance was objectively deficient, and (2) a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial." *Id.*; *see also, Strickland v. Washington*, 466 U.S. 669; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984).

Additionally,

To demonstrate objectively deficient performance under the first part of the test, [the defendant] must overcome a strong

R. at 433, p. 8, lines 4-13. The defendant asserts that, while not reflected in the record on appeal, defendant's counsel never set up the weekly telephone calls as represented to the trial court and was therefore ineffective by failing to adequately communicate with the defendant.

"In proving the first prong of the *Strickland* test [to show ineffective assistance of counsel], the defendant must point to specific instances in the record where counsel's assistance was inadequate." *State v. Strain*, 885 P.2d 810, 814 (Utah App. 1994) (citing *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066). At the hearing to address the defendant's concerns with his counsel, the trial court allowed the defendant and his trial counsel to address concerns with regard to the issue of communication between the defendant and his counsel. The trial court then stated

The Court will take judicial notice that both Mr. McCaughey and Mr. Delicino have handled numerous capital cases in the state of Utah. Court (sic) finds that they are very well-prepared, very competent in these types of cases. The Court should note that in this case these two gentlemen have been very diligent in their representation, and, again, Mr. Jones, I know you don't see this, but they've filed motions, they've appeared in court multiple times in this matter, both telephonically and in person. They've addressed their concerns to the Court with respect to your case. The Court frankly does not believe, Mr. Jones, that you've exhibited sufficient cause at this point in time for the Court, in its discretion, to substitute counsel for Mr. Jones, so, Mr. McCaughey and Mr. Delicino, the Court is going order (sic) that you remain counsel of record for Mr. Jones.¹

R. at 433, p. 10, line 15-p. 11, line 2.

¹ A copy of the portions of the transcript of the hearing addressing the defendant's request for new counsel is attached as Addendum A.

At the hearing on September 9, 2014, at which the defendant changed his pleas, defendant's trial counsel advised the trial court that the defendant would be pleading no contest to the charges against him. Trial counsel stated: "it's his [Mr. Jones'] belief that if this evidence was presented to a jury, especially the evidence that was presented at the preliminary hearing, and the jury can believe that beyond a reasonable doubt and convict him." R. at 434, p. 3, lines 5-10. The trial court then engaged in a colloquy with the defendant prior to taking the defendant's pleas. The following contains the statements of the Court, the defendant, and trial counsel at such hearing.²

THE COURT: Mr. Jones, let me ask you, has anybody put any force, fear, have they promised you anything, have they tried to twist your arm in any way to get you to accept the no contest plea in this case?

DEFENDANT: No, Your Honor.

THE COURT: Are you under the influence of any alcohol, narcotics? Do you have some mental defect or deficiency that would render you incapable of thinking clearly today?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you read, write, and understand the English language?

THE DEFENDANT: Yes, Your Honor.

THE COURT: There's been a document entitled Statement of Defendant's (sic) Support of No Contest Plea, Certificates of Counsel. Have you had a chance to read through that document?

THE DEFENDANT: Yes, Your Honor.

² A copy of the pertinent part of the transcript of the change of plea hearing is attached hereto as Addendum B.

court's record I find that I can knowingly, intelligently and voluntarily; would you agree with that statement?

MR. McCAUGHEY: I would.

THE COURT: I need to ask Mr. Jones.

THE DEFENDANT: Yes, Your Honor.

See R. at 434, p. 6, lines 16-25. Finally, the court continued

THE COURT: Mr. Jones, do you have any questions?

THE DEFENDANT: I do not, Your Honor.

See R. at p. 8, lines 8-10.

The Statement of Defendant in Support of No Contest Plea and Certificate of Counsel referred to by the trial court, and which the defendant signed in open court at the change of plea hearing, specifically states

Appeal. I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead no contest. I understand that if I wish to appeal my sentence I must file a notice of appeal within 30 days after my sentence is entered.

I know and understand that by pleading no contest, I am waiving and giving up all the statutory and constitutional rights as explained above.

See R. at 316. The statements of the defendant at the change of plea hearing indicated that the defendant understood the terms of the plea statement and had no questions regarding the same. Appellate counsel can find no record evidence to support

The ineffectiveness of a defendant's counsel may take many forms and result in relieving a criminal defendant of an undesirable result. The ineffectiveness of counsel that contributes to a flawed guilty plea, however, can spare a defendant the consequences of her plea only if the defendant makes out the same case as required by every defendant who seeks to withdraw a plea: that the plea was not knowing and voluntary.

State v. Rhinehart, 2007 UT 61, ¶ 13; 167 P.3d 1046, 1048. Notwithstanding the foregoing, this Court cannot allow defendant's argument to be used to circumvent jurisdictional requirements. *See State v. Ott*, 2010 UT 1, ¶ 11-12; 247 P.3d 344, 348.

“When a defendant enters a guilty plea, the sentencing court engages in a ‘rule 11 colloquy’ with the defendant to ‘establish that the defendant’s guilty plea is truly knowing and voluntary” *Oliver v. State*, 2006 UT 60, ¶ 6, 147 P.3d 410, 412 (*quoting State v. Visser*, 2000 UT 88, ¶ 11; 22 P.3d 1242, 1245). Addendum B sets forth the rule 11 colloquy in this case, after which the trial court found that the pleas were entered knowingly and voluntarily—a finding with which the defendant verbally agreed. *See R* at 434, p. 6, lines 16-25.

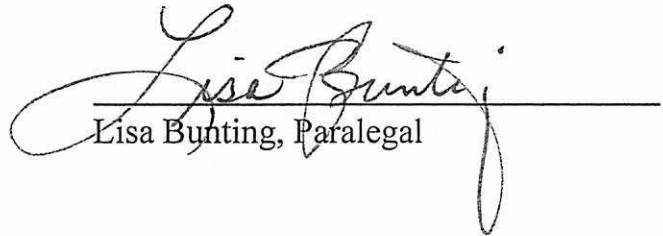
Based on the above, counsel believes that he cannot make a good-faith, non-frivolous argument to seek to have defendant's pleas withdrawn due to the ineffectiveness of his appointed trial counsel. It is clear that defendant failed to attempt to withdraw his pleas prior to sentencing. Further, defendant's claims that his pleas were not made knowingly or voluntarily are not supported by the record, nor defendant's own representations in open court. Thus, after careful examination, counsel believes this issue

Certificate of Service

I hereby certify that on this // day of December, 2015, I mailed a true and correct copy of the foregoing to:

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Assistant Utah Attorney General
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Brock R. Belnap
Washington County Attorney
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St. George, UT 84770



Lisa Bunting, Paralegal

1 CASE NO. 111500245
2 APPELLATE NO. 20141161
3 DEPT. ST. GEORGE - #2A

4 IN THE FIFTH DISTRICT COURT IN
5 AND FOR WASHINGTON COUNTY
6 STATE OF UTAH

7 -----ooOoo-----

8 STATE OF UTAH,)

9 Plaintiff,)

10 vs.)

11 RICHARD ANDREW JONES,)

12 Defendant.)
13

TRANSCRIPT
OF
HEARING RE: APPOINTMENT
OF NEW COUNSEL
FILED
UTAH APPELLATE COURTS

APR 10 2015

14
15 BEFORE THE HONORABLE ERIC A. LUDLOW
16 DISTRICT COURT JUDGE

17 THURSDAY, APRIL 25, 2013
18 2:10 P.M.

19 APPEARANCES:

20 For the Plaintiff:

RYAN SHAUM, ESQ.
Deputy County Attorney

21
22 For the Defendant:

STEPHEN MCCAUGHEY, ESQ.
JEREMY DELICINO, ESQ.

23 FILED
24 UTAH APPELLATE COURTS

APR 10 2015

20141161. CA

25 Transcribed by: Mary Beth Cook, CSR, RPR

1 their concerns to the Court with respect to your
2 case.

3 The Court frankly does not believe,
4 Mr. Jones, that you've exhibited sufficient cause
5 at this point in time for the Court, in its
6 discretion, to substitute counsel for Mr. Jones,
7 so, Mr. McCaughey and Mr. Delicino, the Court is
8 going to order that you remain counsel of record
9 for Mr. Jones.

10 Mr. Shaum, I have not allowed you to
11 weigh in on this matter. Is there any record that
12 you need to make?

13 MR. SHAUM: No, Your Honor, there's not.

14 THE COURT: Counsel, do you want me to
15 draft an order for the record with respect to the
16 Court's ruling?

17 MR. McCAUGHEY: That would be fine. I
18 guess my concern is if we can have -- if we can
19 find out what the policy, like I said, we can do
20 that, of the Iron County jail is so we can set
21 these calls up. We're happy to talk to Mr. Jones,
22 and I want to make sure we can get that done.

23 THE COURT: Counsel, the problem that
24 the Court has I could make a ruling with respect
25 to Washington County.

1 CASE NO. 111500245
2 APPELLATE NO. 20141161
3 DEPT. ST. GEORGE - #2A

4 IN THE FIFTH DISTRICT COURT IN
5 AND FOR WASHINGTON COUNTY
6 STATE OF UTAH

7 -----ooOoo-----

8 STATE OF UTAH,)
9 Plaintiff,)
10 vs.)
11 RICHARD ANDREW JONES,)
12 Defendant.)

TRANSCRIPT
OF
CHANGE OF PLEA
FILED
UTAH APPELLATE COURTS

13 APR 10 2015

14 BEFORE THE HONORABLE ERIC A. LUDLOW
15 DISTRICT COURT JUDGE

16 TUESDAY, SEPTEMBER 9, 2014
17 8:30 A.M.

18
19 APPEARANCES:

20 For the Plaintiff: RYAN SHAUM, ESQ.
21 Deputy County Attorney

22 For the Defendant: STEPHEN MCCAUGHEY, ESQ.
23 UTAH APPELLATE COURTS

24 APR 10 2015

20141161-CA

25 Transcribed by: Mary Beth Cook, CSR, RPR

1 THE COURT: There's been a document
2 entitled Statement of Defendant's Support of No
3 Contest Plea, Certificates of Counsel. Have you
4 had a chance to read through that document?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Have you had a chance to go
7 through that document with your attorney,
8 Mr. McCaughey?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Is there anything about the
11 document that you do not understand?

12 THE DEFENDANT: No, Your Honor.

13 THE COURT: Mr. Jones, I need you to
14 listen carefully as Mr. Shaum's -- and I think
15 Mr. McCaughey probably has, but, Mr. Shaum, do you
16 need to make an additional record?

17 MR. SHAUM: I'll just submit on what
18 Mr. McCaughey's already (inaudible) to the Court.

19 THE COURT: Okay. Mr. McCaughey, has
20 Mr. Jones signed the paperwork?

21 MR. McCAUGHEY: He has not, Your Honor.

22 THE COURT: Mr. Jones, you received a
23 copy of the Amended Information; is that correct?

24 THE DEFENDANT: Yes.

25 THE COURT: Mr. McCaughey and Mr. Jones,

1 the Amended Information Count 1, aggravated
2 murder, a first-degree felony?

3 THE DEFENDANT: No contest, Your Honor.

4 THE COURT: And Count 2, aggravated
5 murder, a first-degree felony, how you would like
6 to plead?

7 THE DEFENDANT: No contest.

8 THE COURT: And, Mr. Shaum, no contest
9 pleas acceptable to the State?

10 MR. SHAUM: Yes, they are, Your Honor.

11 THE COURT: There is a factual basis,
12 Mr. McCaughey, found on page 3 of the agreement.
13 Do you agree that's what the State's evidence
14 would show?

15 MR. McCAUGHEY: We do, Your Honor.

16 THE COURT: Mr. Jones, the Court is
17 going to go ahead and accept the no contest pleas.
18 The Court also is going to incorporate the
19 Statement of Defendant in Support of No Contest
20 Plea, Certificate of Counsel in the court's record
21 I find that I can knowingly, intelligently and
22 voluntarily; would you agree with that statement?

23 MR. McCAUGHEY: I would.

24 THE COURT: I need to ask Mr. Jones.

25 THE DEFENDANT: Yes, Your Honor.